



# Surprising Legacies of Brown v. Board

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## Surprising Legacies of *Brown v. Board*

Martha Minow\*

When Representative Diane Wilkerson stood at the recent Massachusetts constitutional convention, she spoke of growing up in Arkansas after the Supreme Court decision in *Brown v. Board of Education*.<sup>1</sup> Fighting tears, she recalled how the public hospital refused to admit her mother to deliver her children. She said, “I know the pain of being less than equal and I cannot and will not impose that status on anyone else. . . . I was but one generation removed from an existence in slavery. I could not in good conscience ever vote to send anyone to that place from which my family fled.”<sup>2</sup>

About what pending issue was she speaking? She cast her vote against proposals to ban same-sex marriage in the Massachusetts constitution. Proposals to create a separate civil union status would offer legal and social benefits to these couples but excluding them from marriage would erect a “separate but equal”<sup>3</sup> regime that would not grant real equality. This argument is one perhaps surprising legacy of *Brown v. Board*. The analogy to *Brown* has been ringing ever since the high court of Massachusetts found the marriage law excluding same-sex couples to violate the state constitution.<sup>4</sup> The Court initially did not say whether civil unions would be satisfactory or instead whether marriage itself had to become available to meet the state constitution’s equality guaranty. The debate has registered in the public imagination that the struggle for gay rights is indeed the civil rights struggle of our day. A key legacy of *Brown* is that people

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\* William Henry Bloomberg Professor of Law, Harvard Law School. Another version of this essay will appear in LEGACIES OF *BROWN*: MULTIRACIAL EQUITY IN AMERICAN EDUCATION (Dorinda J. Carter et al. eds., 2004) (forthcoming).

1. 349 U.S. 294 (1955), *supplementing* 347 U.S. 483 (1954).

2. Frank Phillips & Raphael Lewis, *Two Marriage Amendments Fail, Lawmakers to Reconvene Today*, BOSTON GLOBE, Feb. 12, 2004, at A1, B7.

3. *Brown*, 347 U.S. at 491 (quoting *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

4. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Opinions of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

now convinced of its rightness must ask themselves what current struggle will look similarly so right fifty years hence.

Perhaps the most powerful legacy of *Brown v. Board* is this: opponents in varied political battles fifty years later each claim ties to the decision and its meaning. So although the analogy between *Brown* and same-sex marriage has divided Black clergy, each side vies to inherit the civil rights heritage.<sup>5</sup> President George W. Bush invoked *Brown* in opposing race-conscious college admission practices.<sup>6</sup> The success of *Brown* in reshaping the moral landscape has been so profound that I fear we do not fully comprehend its legacies—and may fail to attend sufficiently to continuing controversy and complexities in its wake.<sup>7</sup> I will talk today about legacies that may not be so obvious—after first considering how to understand what *Brown* did and did not accomplish directly.

### I. *BROWN* AND RACIAL DESEGREGATION IN SCHOOLS

The most famous decision of the United States Supreme Court, *Brown v. Board of Education* stands both as the “landmark”<sup>8</sup> emblem of social justice and the symbol of the limitations of court-led social reform. The Court’s words eliminated racial segregation as an acceptable social practice in domains governed by the Constitution’s equal protection clause, but the Court-supervised remedial process produced protracted and sometimes violent conflicts over the succeeding decades. Since the 1980s, judicial withdrawal from school desegregation suits and patterns of residential segregation have contributed to increasing racial resegregation in public schools in the

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5. See Michael Paulson, *Black Clergy Rejection Stirs Gay Marriage Backers*, BOSTON GLOBE, Feb. 10, 2004, at B1.

6. See Ralph Reed, *History Shows GOP on Side of Civil Rights*, ATLANTA J.-CONST., Dec. 19, 2002, at 25A.

7. Some scholars have made careers in debating whether the Supreme Court’s decision in *Brown v. Board of Education* itself deserves credit for the civil rights revolution. See GERALD ROSENBERG, *HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* (1993). In the years between 1954 and the adoption of the 1964 Civil Rights Act, southern whites used harassment, intimidation, and outright resistance to any movement toward school desegregation. I do not here mean to resolve that debate and instead take the confluence of social movement, court action, and legislative action surrounding *Brown* as a whole.

8. A Lexis search of law review articles produced 508 such references (*brown* /2 board /9 landmark) (July 6, 2004).

United States.<sup>9</sup> Many white students have little or no interaction with students of other races due to residential isolation.<sup>10</sup> White families who have options avoid racially mixed schools.<sup>11</sup> Large urban districts, in which seventy percent of the students are non-white and over half are poor or near poor, face higher levels of violence, disruption, dropouts and lower test scores than suburban schools.<sup>12</sup> The gap in achievement when students are compared by race persists across all age groups, even when controlled for economic class. Thus, speaking of *Brown* today means speaking both of landmark social change and obdurate racialized practices. This makes the fiftieth anniversary of the decision a complex moment for simultaneous celebration and critique.<sup>13</sup>

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9. One source states: "In many districts where court-ordered desegregation was ended in the past decade, there has been a major increase in segregation. The courts assumed that the forces that produced segregation and inequality had been cured. This report shows they have not been." GARY ORFIELD & CHUNGMEI LEE, HARVARD UNIV., *BROWN AT 50: KING'S DREAM OR PLESSY'S NIGHTMARE?* 2 (2004), available at <http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf>.

Although American public schools are now only sixty percent white nationwide and nearly one-fourth of U.S. students are in states with a majority of nonwhite students, most white students have little contact with minority students except in the South and Southwest. . . . The vast majority of intensely segregated minority schools face conditions of concentrated poverty, which are powerfully related to unequal educational opportunity. Students in segregated minority schools can expect to face conditions that students in the very large number of segregated white schools seldom experience. Latinos confront very serious levels of segregation by race.

The Civil Rights Project, *Brown at 50: King's Dream or Plessy's Nightmare?* (Jan. 17, 2004), available at <http://www.civilrightsproject.harvard.edu/news/pressreleases/brown04.php> (last visited June 17, 2004).

10. *Id.* at 16 (noting Sean F. Reardon & John T. Yun, *Integrating Neighborhoods, Segregating Schools: The Retreat from School Desegregation in the South, 1990–2000*, 81 N.C. L. REV. 1563 (2003)).

11. *Id.* at 4 (describing both selections of private schools and movement to white suburbs).

12. JENNIFER HOCHSCHILD & NATHAN SCOVRONICK, *THE AMERICAN DREAM AND THE PUBLIC SCHOOLS* 25 (2003).

13. For example, the University of Illinois announced its plans for celebration with two sharply contrasting sentences. See The University of Illinois at Urbana-Champaign, *Brown vs Board of Education Jubilee Commemoration*, at <http://www.oc.uiuc.edu/brown> (last visited July 7, 2004): "On May 17, 1954, America was changed forever when the United States Supreme Court ruled unanimously to outlaw racial segregation in the nation's public schools;" and in contrast, "That landmark decision in favor of simple social justice set the country on a course of debate, dissent, and change that continues today." See *id.*

Celebration and critique: this is reminiscent of Justice Thurgood Marshall's view during the Bicentennial celebrations of the U.S. Constitution.<sup>14</sup> He warned of a complacent belief that such a celebration could engender.<sup>15</sup> And he emphasized that the founding document was flawed from the start, riddled with the contradiction between preserving slavery and committing to freedom and equality for "We, the People."<sup>16</sup> To be fair, the specific notion of an original flaw resonates not so much with the 1954 *Brown I* decision, declaring racial separation "inherently unequal."<sup>17</sup> Instead, it fits the Court's 1955 "all deliberate speed" language in its *Brown II* opinion about the timing for remedying the intentionally segregated schools.<sup>18</sup> Like the Clause in the original constitution counting slaves as three fifths of a person for apportionment purposes and protecting the property rights of slaveholders, "all deliberate speed" was the compromise offered by a Court preoccupied with white resistance to racial equality. The dramatic moment of resistance in Little Rock, when Governor Faubus brought out the Arkansas National Guard to prevent nine Black students from enrolling in the Central High School, led a reluctant President Eisenhower to send in national troops.<sup>19</sup> The Supreme Court affirmed this federal power to implement *Brown*, but Southern resistance persisted in almost every school district.<sup>20</sup> Many people viewed the "all deliberate speed" language of *Brown II* as a signal that encouraged both noncompliance

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14. Thurgood Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 HARV. L. REV. 1 (1987).

15. *Id.*

16. *Id.*

17. See 347 U.S. 483, 495 (1954).

18. See 347 U.S. 294, 301 (1955).

19. ROBERT J. COTTRILL ET AL., *BROWN V. BOARD OF EDUCATION: CASTE, CULTURE, AND THE CONSTITUTION* 192 (2003).

20. *Id.* at 193–94.

with, and even resistance to, desegregation. Hence, we have the continuing national failure to achieve racial justice.<sup>21</sup>

Martin Luther King, Jr.'s leadership of a movement of civil disobedience, three hundred thousand people in the 1963 March on Washington, and President Lyndon Johnson's political skills following the assassination of President John F. Kennedy each crucially contributed to the political and social struggles producing the Civil Rights Act of 1964. For the first time, we had serious federal enforcement of *Brown*. That law not only authorized the Department of Justice to enforce *Brown* through litigation, but also to withhold federal funds from school systems that discriminated against African-Americans. We will never know what would have happened if instead the phrase was "full speed ahead," but the phrase marks a fault line lying between the two *Brown* opinions. The continuing failure to realize the vision of *Brown* seems persistently linked to the white resistance that fault line represents.

Justice Marshall's warning about the complacency of celebration remains relevant, though, even to the first *Brown* decision. For if *Brown* contained no internal flaw itself, it bequeathed a legacy of complexity about precisely what is equality. What is the normative vision of a just and equal society? Is separate always inherently unequal? Among the memorable ideas in the Supreme Court's landmark opinion in *Brown v. Board of Education*, these two stand out:

In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right that must be made available to all on equal terms.<sup>22</sup>

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21. See CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED 10–11 (2004).

22. 347 U.S. 483, 493 (1995).

And:

We conclude that in the field of public education, the doctrine of “separate but equal” has no place. Separate educational facilities are inherently unequal.<sup>23</sup>

In the context of intentional and invidious racial segregation, these two ideas seem obviously compatible. The way to produce equal opportunity in education would be to end racial segregation; if separation is inherently unequal, then equality requires its ending. Yet even in this context, over time, it has become unclear whether equal opportunity demands simply ending official assignment of students to different schools based on their race or also demands integration in the same school—in the same classrooms—of students with different racial and ethnic identities. Denise Morgan put the point sharply: “Attending predominantly Black schools can be harmful to Black children because those schools tend to be educationally inferior, not because Black children are inferior, or because access to white children is inherently positive.”<sup>24</sup> Did *Brown* find racially separate education inherently unequal because it tended to be educationally inferior or because it is always inferior unless racially integrated? Does segregation inherently convey the stamp of hierarchy? Or is its inherent limitation the deprivation of vital social interactions across group identities? Whatever the moral or empirical answer, the legal answer is clear. Racially segregated education is permitted if it does not directly or recently stem from intentional governmental action.

The Supreme Court has allowed the termination of judicially supervised integration plans when the “vestiges” of official racial segregation seem remote, even in the face of resegregation through housing patterns. As a result, the percentage of Black students attending schools where the majority of other students are children of color has increased across the country over the past decade.<sup>25</sup> This reversed the trend from the prior decade when courts monitored

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23. *Id.* at 495.

24. Denise C. Morgan, *What is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER L.J. 99, 106 (1991).

25. ORFIELD & LEE, *supra* note 9, at 20 tbl.8.



school assignments. The resegregation does not stem from decisions by school officials, but patterns of housing and jobs that in turn reflect a mix of private preferences and subtle discrimination.<sup>26</sup> White families with financial means prefer predominantly white communities and white schools, which they associate with better opportunities for their children.<sup>27</sup> Families of color face not only economic barriers but also direct discrimination in the mortgage and housing markets.<sup>28</sup> The contemporary litigation under state constitutions and related state legislative efforts to promote “adequate” education represents serious efforts to improve instruction and student performance with requisite investment in schooling, but without seeking racial integration of the student body.<sup>29</sup>

Is racial integration the measure of racial justice? Richard Kallenberg recently surveyed national attitudes and asserted that there is a consensus that integrated schools seem like a good idea but “we shouldn’t do anything to promote them.”<sup>30</sup> Justice Clarence Thomas voiced the views of many, even within the African-American community, who are insulted by the suggestion that educational

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26. HOCHSCHILD & SCOVRONICK, *supra* note 12, at 45.

27. *Id.*

28. One detailed study of the Boston area explores the complex interaction among these factors. DAVID J. HARRIS, FAIR HOUS. CTR. OF GREATER BOSTON, & NANCY MCARDLE, HARVARD UNIV., MORE THAN MONEY: THE SPATIAL MISMATCH BETWEEN WHERE HOMEOWNERS OF COLOR IN METRO BOSTON CAN AFFORD TO LIVE AND WHERE THEY ACTUALLY RESIDE (2004), available at [http://www.civilrightsproject.harvard.edu/research/metro/residential\\_choice.php](http://www.civilrightsproject.harvard.edu/research/metro/residential_choice.php) (last visited June 17, 2004).

29. By 2002, forty-three suits generated nineteen decisions striking down school-finance schemes under the relevant state constitutions. See Liz Kramer, *Achieving Equitable Education Through the Courts: A Comparative Analysis of Three States*, 31 J.L. & EDUC. 1 (2002); see also Stewart G. Pollock, *School Finance in the Courts*, 1998 ANN. SURV. AM. L. 133 (1998) (summarizing developments). For a helpful overview of recent suits, see Molly McUsic, *The Law's Role in the Distribution of Education: The Promises and Pitfalls of School Finance Litigation*, in LAW AND SCHOOL REFORM: SIX STRATEGIES FOR PROMOTING EDUCATIONAL EQUITY 88 (Jay B. Heubert ed., 1999) [hereinafter LAW AND SCHOOL REFORM], and generally William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597 (1994). See also Patricia F. First & Barbara M. DeLuca, *The Meaning of Educational Adequacy: The Confusion of DeRolph*, 32 J.L. & EDUC. 185 (2003) (Ohio litigation); Michael Paris, *Legal Mobilization and the Politics of Reform: Lessons from School Finance Litigation in Kentucky, 1984–1995*, 26 LAW & SOC. INQUIRY 631 (2001); James E. Ryan, *Sheff, Segregation and School Finance Litigation*, 74 N.Y.U. L. REV. 529 (1999) (Connecticut).

30. RICHARD KALLENBERG, ALL TOGETHER NOW: CREATING MIDDLE-CLASS SCHOOLS THROUGH PUBLIC SCHOOL CHOICE 42 (2001).

excellence cannot occur in an entirely or predominantly Black or Hispanic school. Finding students of color in schools largely with other students of color, in this view, is not itself a betrayal of the promise of *Brown*, he maintains. Such a betrayal comes instead in low expectations and low achievement levels among such students.

A legacy of *Brown* is an apparently enduring debate over racial integration. Equal opportunity is the aspiration, if not the given. But does equal opportunity mean ending the symbolic and practical subordination of segregation and paying attention to race or does it mean creating a color-blind society and halting the explicit use of race? Our national ambivalence on these issues is well captured in the Supreme Court's recent affirmative action decision. The Court extended approval for diversity rationales for racially conscious admissions to universities and colleges, but Justice O'Connor's opinion tethered this approval to an expectation that attention to race and ethnicity would no longer be necessary, and perhaps no longer acceptable, twenty-five years from now.<sup>31</sup>

## II. IN SCHOOLS, OUTSIDE OF RACE

Let's consider the legacies of *Brown* in schools, but beyond the context of race. I suggest that *Brown* enshrined equal opportunity as the aspiration, if not the given, for students whose primary language is not English, for students who are immigrants, for girls, for students with disabilities, for gay or lesbian or transgendered students, and for religious students. The racial justice initiative expanded to include all these students so that today, American public schools are preoccupied with the aspiration of equality and the language of inclusion. Fifty years after *Brown*, equality is the drone string, the underlying tone of school missions and evaluation. Yet no less pervasive is the struggle over realizing equality through integrated or separate settings, and it is to the permutations I now turn. As we will see, these ongoing debates point increasingly to educational expertise to answer a question implicit, but not central to, *Brown v. Board of Education*: what kinds of instruction actually promote equal opportunities for all children?

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31. *Grutter v. Bollinger*, 539 U.S. 306 (2003).

*A. Language*

*Brown*, the social movement behind it, and the strategy of law reform leading up to it inspired people concerned with the exclusion and inequality experienced by others besides African-Americans, and schools remained a central focus.<sup>32</sup> For cloudy reasons, the 1964 Civil Rights Act itself included national origin in its scope of protection. The Department of Health, Education, and Welfare exercised its authority under the Act to issue guidelines governing bilingual education and students learning English. The Supreme Court in 1974 upheld such regulations and found the San Francisco school district in violation because it failed to develop tailored programs for Chinese-speaking students.<sup>33</sup> Here, the act of including the Chinese-speaking students in the mainstream classroom with no accommodation amounted to discrimination forbidden on the basis of national origin to any school district receiving federal financial assistance because the Chinese-speaking students received fewer benefits than the English-speaking majority.<sup>34</sup> Besides representing a key decision to use impact rather than intention as the measure of illicit discrimination, the decision exposed a new version of the tension between integration and separate treatment.<sup>35</sup>

Congress soon responded with the Equal Education Opportunities Act of 1974, requiring recipient schools “to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs.”<sup>36</sup> With the Bilingual Education Act of 1974, Congress also extended some degree of funding to schools offering bilingual education.<sup>37</sup> As court challenges pressed for greater bilingual education programming, some courts agreed and others deferred to local school boards.<sup>38</sup> One influential

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32. See Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571 (1995).

33. *Lau v. Nichols*, 414 U.S. 563 (1974).

34. *Id.*

35. For my earlier treatment of this issue, see MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW* (1990).

36. Pub. L. No. 93-380, § 204(f), 88 Stat. 484, 515 (1974) (codified at 20 U.S.C. § 1703(f) (2000)).

37. 20 U.S.C. § 880(b) (1976).

38. William Ryan, Note, *The Unz Initiatives and the Abolition of Bilingual Education*, 43

decision declined to require bilingual education as the means for ensuring equal educational opportunity.<sup>39</sup> Eliciting both strong support and strong opposition, such programs when well run afford real access to the curriculum for students learning English. But they also risk segregating students learning English from other students and undermining racial desegregation plans. Amid competing scholarly assessments of the effectiveness of varied kinds of bilingual programs with immersion in English-speaking classrooms,<sup>40</sup> the evidence strongly suggests that the quality of the teachers is a more significant factor in student achievement than the choice between bilingual instruction and English immersion.<sup>41</sup> Does the centrality of teaching quality support continuing experiments with bilingual education on the grounds that it has never been given a fair chance, or will separate instruction never be equal, practically or symbolically?<sup>42</sup>

Intense political pressures on both sides of the debate over bilingual education affect the quality and perception of evaluation efforts and the movement for legal bans on bilingual education. A California entrepreneur, Ron Unz, successfully crafted, financed, and pushed for the passage of an initiative to eliminate bilingual education first in that state and then in Arizona and Massachusetts.<sup>43</sup> Courts rejecting these bans on bilingual education rely on deference to educational expertise. So do courts that resist arguments for

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B.C. L. REV. 487 (2002).

39. See *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981) (directing that school districts be evaluated in terms of adoption and implementation of a pedagogically sound approach for meeting the needs of limited English proficiency students).

40. See Marcelo Suarez-Orozco et al., *Cultural, Educational, and Legal Perspectives on Immigration: Implications for School Reform*, in *LAW & SCHOOL REFORM*, *supra* note 29, at 190–91 (discussing the debate over whether proficiency in English requires up to six years to acquire); Charu A. Chandra Sekhar, Comment, *The Bay State Buries Bilingualism: Advocacy Lessons From Bilingual Education's Recent Defeat in Massachusetts*, 24 CHICANO-LATINO L. REV. 43 (2003); Lisa Ellern, Note, *Proposition 227: The Difficulty of Insuring [sic] English Language Learners' Rights*, 33 COLUM. J.L. & SOC. PROBS. 1 (1999); Christine H. Rossell & Keith Baker, *The Educational Effectiveness of Bilingual Education*, 30 RES. IN THE TEACHING OF ENG. 7 (1996).

41. See Thomas F. Felton, Comment, *Sink or Swim? The State of Bilingual Education in the Wake of California Proposition 227*, 48 CATH. U. L. REV. 843 (1999).

42. Both options may remain inadequate due to other factors—such as the economic class of the affected students and neighborhoods.

43. Chandra Sekhar, *supra* note 40. California still allows parents to elect either bilingual education or immersion under certain circumstances.

judicially imposed bilingual education.<sup>44</sup> No one suggests a goal other than integration, eventually, but many people still urge short-term separate instruction to promote acquisition of language, to maintain learning in other subjects while the student learns English, and to support positive experiences in school that respect the child's heritage. Because many bilingual programs have not achieved these short-term goals and because students often remain in separate classes for years, we must consider how these programs really work, rather than focus only upon their aspirations.

### *B. Gender*

No less controversial has been the treatment of gender, and here again combining overt commitment to equal opportunity with intense disagreement over integration compared with separate instructional settings. Good, though not undisputed, authority suggests that "sex" made its way into the employment section of the 1964 Civil Rights Act (Title VII) only as a ploy to defeat its passage.<sup>45</sup> Whatever the truth of that matter, deliberate argument and advocacy overcame strong opposition to produce a commitment to gender equality in the 1972 Education Amendments that produced Title IX.<sup>46</sup> Yet the analogy between race and gender has always been disputed, especially around the issue of whether separate can ever be equal.<sup>47</sup> Partly because historically the ideology surrounding gender accorded women, or at least white privileged women, a special place in home and family as a separate sphere, the inclusion of women in male settings has at times seemed to involve a loss of privilege or

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44. Compare *Castaneda v. Pickard*, 648 F.2d 989 (5th Cir. 1981), with *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998).

45. BARBARA WHALEN & CHARLES WHALEN, *THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT* 233-34 (1985); see also 110 CONG. REC. 2581 (1964) (statement of Rep. Edith Green) (suggesting that Rep. Howard W. Smith proposed to insert "sex" to prevent the passage of Title VII); but see Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163, 165 (1991); Robert C. Bird, *More than a Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137 (1997).

46. See 20 U.S.C. § 1681(2) (2000).

47. For a thoughtful treatment of this analogy, see Christine Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279 (1987).

protection.<sup>48</sup> This has contributed to the judicial fight over the proper method for analyzing constitutional challenges to gender-based distinctions.<sup>49</sup> The analogy to *Brown* has inspired women's rights advocates to challenge single-sex education, with mixed results and with increasing debate among advocates about what to seek.

The Supreme Court rejected single-sex education in nursing, a traditional women's field,<sup>50</sup> and in military training, a field from which women historically were excluded.<sup>51</sup> Yet the Supreme Court has not rejected single-sex public schools where enrollment is voluntary and the quality is "substantially equal" to other schools. The United States Court of Appeals for the Third Circuit, in the leading case, *Vorchheimer v. School District of Philadelphia*,<sup>52</sup> distinguished race and gender for purposes of separate education by asserting that real differences remain by gender but not by race, and by emphasizing the value of local control and family choice.<sup>53</sup> The same situation produced a later decision allowing entrance for girls in an all-boys school while preserving the all-girls schools through a combination of "tradition, informal district policy, and success in warding off the handful of boys who express interest."<sup>54</sup> Compensatory rationales for separate instruction for girls may still be defensible.<sup>55</sup> Plausible rationales for single-sex education could

48. See *id.*; Barbara A. Brown et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 876 (1971); Martha Minow, *Rights of One's Own*, 98 HARV. L. REV. 1084 (1985) (reviewing Elizabeth Cady Stanton's views).

49. Compare *Craig v. Boren*, 429 U.S. 190 (1976) (requiring important objectives behind gender distinctions) with *United States v. Virginia*, 518 U.S. 515 (1996) (requiring an "exceedingly persuasive justification" for sex-based distinctions); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982) (same); *Rostker v. Goldberg*, 453 U.S. 57 (1981) (accepting differential treatment of men and women in the military context); *Michael M. v. Super. Ct. of Sonoma County*, 450 U.S. 464 (1981) (asking whether men and women are similarly situated in relation to the statutory rape law).

50. *Miss. Univ. for Women*, 458 U.S. at 733.

51. *Virginia*, 518 U.S. at 558.

52. 532 F.2d 880 (3d Cir. 1976), *aff'd* by an equally divided court, 430 U.S. 703 (1977).

53. *Id.*

54. Mary B.W. Tabor, *Planners of a New Public School for Girls Look to Two Other Cities*, N.Y. TIMES, July 22, 1996, at B2, *quoted in* ROSEMARY C. SALOMONE, SAME, DIFFERENT, EQUAL: RETHINKING SINGLE-SEX SCHOOLING 127 (2003).

55. So argues Denise Morgan, who revisited the early writings of Justice Ruth Bader Ginsburg, surely the architect of modern gender-equality jurisprudence. Denise C. Morgan, *Finding a Constitutionally Permissible Path to Sex Equality: The Young Women's Leadership School of East Harlem*, 14 N.Y.L. SCH. J. HUM. RTS. 95, 104 (1997) (analyzing Ruth Bader

include compensating for inadequate opportunities in the past, improving educational outcomes and diversifying school choice.<sup>56</sup> Some teachers and experts suggest that given societal expectations and pressures, girls perform better in all-girls schools or all-girls mathematics classes.

The most recent word by the Supreme Court is Justice Ginsburg's opinion rejecting exclusion of women from the Virginia Military Academy. The decision itself leaves room for single-sex instruction where justifiable as "exceedingly persuasive" in terms of an important government interest that is substantially related to that purpose.<sup>57</sup> Especially because Virginia offered a patently inferior alternative to the women excluded from the Virginia Military Academy, the Court did not need to resolve whether single-sex education could ever be equal. That general question certainly remains open for single-sex programs premised on remedial and compensatory rationales.

In this vein, sometimes to their own surprise, some feminists have defended the Young Women's Leadership School in Harlem and other single-sex educational experiments while others challenge them in court.<sup>58</sup> Empirical research on student achievement presents a mixed picture, with different gender gaps running to the advantage of both boys and girls. These gaps do not, however, approach the divide in school performance between economically advantaged and disadvantaged students.<sup>59</sup> These very patterns motivated the plan for all-male schools in Detroit and Milwaukee addressing the situation of urban African-American boys, but under pressure and in the face of a lawsuit, the schools became co-ed.<sup>60</sup> Single sex education may have

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Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN'S RTS. L. RPTR. 143 (1978)).

56. See Kimberly Jenkins, An Analytical Framework for Public Single-Sex Elementary and Secondary Schools (2004) (unpublished manuscript, on file with author).

57. *Id.* at 531.

58. Compare Morgan, *supra* note 55 (supporter), with Fred Kaplan, *Storm Gathers Over School in Flower*, BOSTON GLOBE, Feb. 23, 1998, at A1 (describing lawsuit by National Organization for Women and New York Civil Liberties Union claiming the school violates Title IX). For a thoughtful treatment of the suit and its underlying issues, see SALOMONE, *supra* note 54, at 1–25, 61–63.

59. SALOMONE, *supra* note 54, at 114–15; AM. ASS'N OF UNIV. WOMEN EDUC. FOUND., GENDER GAPS: HOW SCHOOLS STILL FAIL OUR CHILDREN (1998).

60. SALOMONE, *supra* note 54, at 133–40.

seemed less justifiable for boys given the historical status and resource differences in educational opportunities for boys and girls. But symmetrical treatment, permitting both kinds of single-sex education, may emerge. Judges may find that permitting all-girls but not all-boys schools awkward, or difficult to justify or put in practice. Further, recent research indicates academic vulnerability for boys.<sup>61</sup> To complicate matters, research suggests that all-male environments may actually hinder the achievement of white boys, but improve the achievement of Black and Hispanic boys.<sup>62</sup>

Congressional efforts to support single-sex education experiments faced strong opposition in the 1990s.<sup>63</sup> The current Department of Education signaled in May 2002 an intention to permit experiments with single-sex classrooms and schools with public monetary support, but since has not acted on it.<sup>64</sup> The legacy of *Brown* hovers over debates on single-sex education, and single-sex athletic teams, but equal opportunity is asserted both by those defending and those opposing separation by sex.<sup>65</sup> To meet this goal, single-sex education should resist perpetuating stereotypes. Can the fact of single-sex education ever avoid implying some need for protection or some inferiority of girls? In any case, single-sex education looks most acceptable when it is available on a voluntary basis as one of many quality options; otherwise, it is too redolent of historical practices of exclusion.<sup>66</sup>

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61. See WILLIAM S. POLLACK, *REAL BOYS' VOICES* (2000); CHRISTINA HOFF SOMMERS, *THE WAR AGAINST BOYS* 158–78 (2000). Although special concerns are rightly raised about Black boys' academic risks, the data suggest problems across the color line. Cynthia Tucker, *Pushy Parents are the Best Boost for Black Boys*, ATLANTA J.-CONST., May 25, 2003, at 10C.

62. Morgan, *supra* note 55, at 119 n.81 (discussing studies).

63. *Id.* at 139–40.

64. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 67 Fed. Reg. 31,098 (May 8, 2002) (notice of intent to regulate).

65. On athletics, some courts have entertained arguments that girls need to be protected from the risks of injury in male contact sports. See, e.g., *Force v. Pierce City R-VI Sch. Dist.*, 570 F. Supp. 1020 (W.D. Mo. 1983). Federal law leaves this as a local question. 34 C.F.R. § 106.41(b) (2000). However, the courts are tending to allow girls to try out for competitive, contact sports. See *Barnett v. Tex. Wrestling Ass'n*, 16 F. Supp. 2d 690 (N.D. Tex. 1998); *Adams v. Baker*, 919 F. Supp. 1496 (D. Kan. 1996). Yet the courts also accept exclusion of boys from girls' teams in order to preserve opportunities for girls. See *Clark v. Ariz. Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982).

66. See Jenkins, *supra* note 56, at 63 (discussing difficulties in ensuring truly voluntary choice where educators may press parents and students toward single-sex options).



*C. Disability*

In 1967, Judge J. Skelly Wright applied *Brown* and its companion case, *Bolling v. Sharpe*, to the system of ability-level tracking used in the District of Columbia public schools and found the resulting racial composition violative of the constitution.<sup>67</sup> Besides demonstrating how any one school can use tracking to segregate internally by race, the decision inspired advocates for children identified with disabilities to pursue desegregation and other equality strategies to end de jure exclusion of, and dismal programs for, students with disabilities from schooling. Prior to the 1970s, only seven states provided education for more than half of their children with disabilities.<sup>68</sup> Those children with disabilities who did receive educational programming did so largely in classrooms or schools removed from their peers. Parents and educators pressed for both more funding and for experiments placing students with disabilities in regular educational settings.<sup>69</sup> Two landmark decisions produced orders requiring free public educational programs for students with disabilities. The 1971 consent decree in *Pennsylvania Association for Retarded Children v. Commonwealth*<sup>70</sup> specifically preferred placement in a regular public school classroom over a separate class for students with disabilities. A summary judgment in *Mills v. Board of Education*,<sup>71</sup> in 1972, rejected the exclusion of children with disabilities from the District of Columbia schools and called for publicly supported education “suited to the [student’s] needs.” Following the decree in *Mills*, the school system held three hundred hearings in the first nineteen months.<sup>72</sup> Congress relied on these court actions when it adopted in 1975 the Education for All Handicapped

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67. *Hobson v. Hansen*, 269 F. Supp. 401, 511–14 (D.C. Cir. 1967). The decision also criticized the segregation of class due to the use of neighborhood school assignments.

68. Jeffrey J. Zettel & Joseph Ballard, *The Education for All Handicapped Children Act of 1975 (P.L. 94-142): Its History, Origins, and Concepts*, in *SPECIAL EDUCATION IN AMERICA: ITS LEGAL AND GOVERNMENTAL FOUNDATIONS* 11, 12 (Joseph Ballard et al. eds., 1982).

69. Robert L. Hughes & Michael A. Rebell, *Special Educational Inclusion and the Courts: A Proposal for a New Remedial Approach*, 25 J.L. & EDUC. 523 (1996).

70. 343 F. Supp. 279, 307 (E.D. Pa. 1972); 334 F. Supp. 1257, 1260 (E.D. Pa. 1971).

71. 348 F. Supp. 866, 878 (D.D.C. 1972).

72. Patricia M. Wald, *Whose Public Interest Is It Anyway? Advice for Altruistic Young Lawyers*, 47 ME. L. REV. 3, 11 (1995).

Children Act, since renamed the Individuals with Disabilities in Education Act.<sup>73</sup> This statute, and the Rehabilitation Act Amendments of 1973, shifted legal treatment of persons with disabilities to a framework of rights rather than support or care.<sup>74</sup>

From the start, the federal law recognized the value of integration—triggered by the requirement that, to the maximum extent feasible, the school system place the child with disabilities in the “least restrictive environment,”<sup>75</sup> known in this context as mainstreaming or inclusion. The law also requires the educational program and related services to be tailored to meet the needs of the individual child.<sup>76</sup> The statutory scheme promotes identification of students who could well have gone undetected in the past and protects against faulty identification, which can produce stigma and misallocation of resources.<sup>77</sup> The law offers participating states money in exchange for plans to ensure appropriate education and related services and administrative procedures for creating individualized education plans with parental participation and opportunities for review.<sup>78</sup> At once an entitlement and an equality commitment, the special education law has become a major focus of attention for schools and parents and a basis for struggles over resources, balancing the interests of individual children and groups of children and assessing when equal opportunity calls for integration or when instead it calls for a specialized, separate instructional settings.

Before the adoption of the law, nearly seventy percent of children with disabilities who received education did so in separate classrooms, or separate schools provided education and services.<sup>79</sup> With the law, and with the advocacy and related changes in educational philosophy it represents, by 1996 over seventy percent of

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73. 20 U.S.C. §§ 1400–487 (2000).

74. Laura F. Rothstein, *Reflections on Disabilities Discrimination Policy—25 Years*, 22 U. ARK. LITTLE ROCK L. REV. 147, 148 (2000).

75. 20 U.S.C. § 1412(a)(5) (2000).

76. *See id.*; 34 C.F.R. § 104.33(b)(1)(i) (2004).

77. Millions of students are currently identified as having a disability and there has been a thirty percent increase in such identifications over the past ten years. National Education Association, Special Education and the Individuals with Disabilities Education Act, at <http://www.nea.org/specialed> (last visited July 11, 2004).

78. 20 U.S.C. §§ 1401, 1414–15 (2000).

79. Hughes & Rebell, *supra* note 69, at 524.

students with disabilities spent at least part of their day in the regular classroom with other students.<sup>80</sup> Nearly half, forty-seven percent, of students with disabilities now spend all their time in the mainstream classroom.<sup>81</sup> Courts initially ordered mainstreaming only if shown to be beneficial, but over time judges began to read the statutory call for mainstreaming to “the maximum extent appropriate.”<sup>82</sup> Some of this transformation grew from the interpretation and implementation of the federal statute and regulations by educators and the development of new instructional techniques that support inclusion of students with disabilities in regular classrooms. But the change also reflected intensive litigation efforts. Although a line of court decisions favor mainstreaming,<sup>83</sup> courts, educators, parents, and scholars continue to disagree over precisely when integration is wise and when, instead, separate instruction can afford equality.

In favor of inclusion are these considerations: (1) socializing with nondisabled peers offers real academic and non-academic benefits for

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80. See *id.* (As of 1996, 34.9% of disabled children were placed in regular classrooms full-time, and 36.3% in part-time programs, 23.5% in separate classrooms, 3.9% in separate schools, 0.9% in residential facilities, and 0.5% in hospitals or visiting programs in the students' homes.).

81. In 1998–99, the states reported that forty-seven percent of these students spent at least eighty percent of the school day in regular classrooms, which is a notable increase over the thirty-one percent of such students who did so in 1978. National Center for Education Statistics, *Contexts of Elementary and Secondary Education: Inclusion of Students with Disabilities in Regular Classrooms*, <http://nces.ed.gov/programs/coe/2002/section4/indicator28.asp> (last visited July 11, 2004).

82. 20 U.S.C. § 1412(a)(5)(A) (2000).

83. See *Hartmann v. Loudoun County Bd. of Educ.*, 118 F.3d 996, 1005 (4th Cir. 1997) (mainstreaming should be tried, but an autistic child placed with aids in general classroom until disruptions proved excessive and child received no benefits in the class were proper considerations for the child's removal); *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F.3d 1398, 1404–05 (9th Cir. 1994) (affirming placement of child with moderate retardation in regular classroom with supplemental support); *Oberti v. Bd. of Educ. of the Borough of Clementon Sch. Dist.*, 995 F.2d 104 (3d Cir. 1993) (district's duty to consider inclusion in regular class before exploring alternatives); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 698–99 (11th Cir. 1991) (using a cost/benefit analysis, child with Down's syndrome was appropriately mainstreamed); *Daniel R.R. v. State Bd. of Educ.*, 874 F.2d 1036, 1060–52 (5th Cir. 1989) (where possible, child to be mainstreamed with appropriate services); Martha M. McCarthy, *Inclusion of Children with Disabilities: Is Required?*, 95 EDUC. L. REP. 823 (1995) (discerning trend toward inclusion). For proposals to refine the trend toward inclusion with exceptions for students who are disruptive or not capable of benefiting academically from placement in the regular classroom, see Kathryn E. Crossley, Note, *Inclusion: A New Addition to Remedy a History of Inadequate Conditions and Terms*, 4 WASH. U. J.L. & POL'Y 239, 257–59 (2000).

the student with disabilities, both in the present and in preparation for navigating life in the future;<sup>84</sup> and (2) learning alongside students with disabilities also can benefit nondisabled students by enhancing their understanding of others, their patience and appreciation of the struggles of others, and their ability to see their classmates as individuals rather than embodiments of stigmatized categories.<sup>85</sup> Factors competing with the integration commitment are: (1) due to resource restrictions, confusion, and misguided worries about teaching the child differently from others, a child with disabilities may not receive tailored instruction or necessary support services while mainstreamed in the regular classroom; and (2) the nondisabled classmates risk interference with their education due to disruptions or distractions caused by the students with disabilities or by the disproportionate teacher attention required by those students.<sup>86</sup> A separate line of contention, less immediately germane to the mainstreaming debate, concerns the allocation of financial and other resources, given that students with disabilities typically require more resources whether placed in the regular or special classrooms.<sup>87</sup> Some may assume that mainstreaming will be cheaper, but when implemented with appropriate supplemental aids and supports, it may well be as costly as separate classrooms with specially trained teachers.

Courts continue, in varying degrees, to grant deference to the expertise of school officials over placement of students with disabilities, but nonetheless recognize the law's dual demand for appropriate placements and placements that, to the extent feasible, permit the child with disabilities to go to school alongside nondisabled peers.<sup>88</sup> Yet the courts have disagreed over precisely

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84. *Oberti*, 995 F.2d at 1216–17; *Daniel R.R.*, 874 F.2d at 1047–48.

85. Daniel H. Melvin II, Comment, *The Desegregation of Children with Disabilities*, 44 DEPAUL L. REV. 599, 656–57 (1995).

86. See Marissa L. Antoinette, Comment, *Examining how the Inclusion of Disabled Students into the General Classroom May Affect Non-Disabled Classmates*, 30 FORDHAM URB. L.J. 2039, 2057–58 (2003) (proposing a “three strikes” removal policy for a student who disrupts the regular classroom); Anne Proffitt Dupre, *A Study in Double Standards, Discipline, and the Disabled Student*, 75 WASH. L. REV. 1 (2000) (examining how the treatment of disruption and discipline poses problems for students).

87. See Wald, *supra* note 72, at 12.

88. Bd. of Educ. v. Rowley, 458 U.S. 176, 181 n.4 (1982) (deference to educators while

how to combine deference to educators with the statutory preference for the least restrictive alternative, producing no single clear test for measuring state compliance with the “least restrictive environment” provision of the law.<sup>89</sup> No simple test could work, however, given the variety of disabling conditions, competing views about the purposes of education and value of integration toward those purposes, and even shifting ideas about the capabilities of children with certain conditions. One commentator warns that the influence of *Brown v. Board of Education* contributes to a simplistic embrace of mainstreaming for all children.<sup>90</sup> An inappropriate placement in the regular classroom does not afford equal educational opportunities if the student cannot gain benefits from it. Thus, for some students with serious mental impairments, learning “life skills” such as shopping for groceries or even dressing oneself are central, which makes the regular classroom a poor fit.<sup>91</sup> Yet even the warning in this sentence echoes historic assumptions that students with physical disabilities could not learn and cautions against shielding from review the assignment of a disabled student to a separate classroom or program. At the same time, segregation or exclusion seems not to trouble parents, especially those of children with learning disabilities, who view the law as a way to obtain special help.<sup>92</sup> This should serve as a reminder that integration is not the exclusive way to achieve equal opportunity; treating people the same who are different is not equal treatment.<sup>93</sup>

*Brown v. Board of Education* provides the template for demanding both equal opportunity and integration for students with disabilities, and working out what that means for individual students will continue to require complex assessments, subject to review. It will also require careful treatment of students with disabilities under

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recognizing Congressional preference for mainstreaming); Oberti, 995 F.2d at 1213–14.

89. Therese Craparo, Note, *Remembering the “Individuals” of the Individuals With Disabilities Education Act*, 6 N.Y.U. J. LEGIS. & PUB. POL’Y 467, 503–05 (2003).

90. *Id.* at 524.

91. *Id.* at 523; see also Theresa Bryant, *Drowning in the Mainstream: Integration of Children with Disabilities After Oberti v. Clementon School District*, 22 OHIO N.U. L. REV. 83, 101–07 (1995) (urging consideration of costs and whether the child with disabilities can benefit from the mainstream classroom and whether the child disrupts that classroom).

92. Bryant, *supra* note 91, at 117 n.283.

93. See MINOW, *supra* note 35.

emerging regimes of mandatory state-wide assessments, scrutiny of the racial and gender disparities in special education labels and placements. Including students with disabilities in mandatory statewide assessment could be at least as crucial to equalizing educational opportunities as classroom integration. Teachers and administrators are more likely to become committed to improving the educational performance of these students in comparable domains with other students when these accountability measures are extended to them.<sup>94</sup> Evidence of over-identification of disabling conditions by race and gender and resulting segregation that affects chiefly African-American boys provides serious grounds for concern, and produces eerie echoes of *Hobson v. Hanson*'s finding that the District of Columbia tracking system amounted to illegal racial segregation.<sup>95</sup> Racial and gender disparities are clues to patterns of under-identification of students in some categories of disability as well, a further complexity in realizing equality in this context.

And then there is the enduring problem of quality of instruction. I have been struck by the ability of truly gifted teachers to teach heterogeneous classes that include students with disabilities. The same children may seem unteachable as a whole group to another teacher, who then may turn to the special education apparatus to identify some students and remove them or obtain a classroom aid or other assistance. It is far from clear that ordering either inclusion or separate instruction will improve quality for either strategy without more explicit direction and resources that necessarily increase the number of talented teachers and better prepares teachers of heterogeneous classes.

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94. See Jane K. Babin, *Adequate Special Education: Do California Schools Meet the Test?*, 37 SAN DIEGO L. REV. 211, 282–85 (2000).

95. Daniel J. Losen & Christopher Edley, Jr., *The Role of Law in Policing Abusive Disciplinary Practices: Why School Discipline is a Civil Rights Issue*, in ZERO TOLERANCE: RESISTING THE DRIVE FOR PUNISHMENT IN OUR SCHOOLS 230 (William Ayers et al. eds., 2001); Theresa Glennon, *Race, Education, and the Construction of a Disabled Class*, 1995 WIS. L. REV. 1237, 1250–54 (1995); see also Patrick Linehan, *Guarding the Dumping Ground: Equal Protection, Title VII and Justifying the Use of Race in the Hiring of Special Educators*, 2001 B.Y.U. EDUC. & L.J. 179, 192 (2001) (recommending hiring special educators of color to reduce the overidentification of students of color).

*D. Citizenship, Sexual Orientation, and Religion*

Echoing *Brown*, but perhaps in surprising ways, many students, parents, schools, and communities are occupied with equality in schools, treatment of noncitizen immigrants and students who identify with or explore lesbian, gay, or transsexual orientations. Perhaps even more surprising are the uses of equality arguments on behalf of religious students and religious schools. Each of these contexts confirm the dominance of an equality framework launched by *Brown*; each recapitulate, in different ways, debates over integration as the sole or best way to achieve equality.

Immigrants and noncitizens: Noncitizen children have faced exclusion as well as segregation in schooling. Arguments for exclusion include claims that their parents have not contributed to support the schools and that free education will create an undesirable incentive for people to immigrate unlawfully. Arguments for inclusion echo *Brown*'s commitments to equal opportunity and recognition of the central importance of education to success in life. Beyond the normative claim of dignity of the person, many proponents of inclusion make the practical point that many, if not most, of these children will stay in this country and will contribute more economically, socially, and politically if they have received an education.

After the Supreme Court in 1982 rejected the effort by Texas to deny a free public education to undocumented school-aged children,<sup>96</sup> California proceeded through a citizens' initiative to exclude unlawful aliens from public schools and to enlist school districts in investigating the legal status of each child.<sup>97</sup> A district court barred implementation of the initiative on the grounds that it interfered with federal immigration law.<sup>98</sup> Governor Pete Wilson appealed the decision, but the next governor dropped the appeal and ended doubt about ending the exclusion of noncitizen children from the schools.<sup>99</sup>

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96. *Plyler v. Doe*, 457 U.S. 202 (1982).

97. 1994 Cal. Legis. Serv. Prop. 187 (West).

98. *League of United Latin Am. Citizens v. Wilson*, 908 F. Supp. 755 (C.D. Cal. 1995).

99. See Terry McDermott, *Some Are Embittered by Fate of Prop. 187*, L.A. TIMES, Aug. 2, 1999, at A1.

Meanwhile, many communities have created “newcomer schools” which are separate school facilities for recent immigrants. Intended to provide a comfortable transitional environment, these schools include bilingual and bicultural education and address issues for older students who have not had much previous schooling or literacy instruction in any language.<sup>100</sup> The school systems are especially worried about the probability that enrollment in regular schools will frustrate adolescent immigrant children and lead them to drop out. By design, these schools separate these immigrants from other students for at least a year, and sometimes longer, but do so in order to provide tailored instruction and a supportive environment. Yet how can such programs avoid stigmatizing the students? Do they provide inferior resources and instruction?

The federal No Child Left Behind Act<sup>101</sup> requires states to include new immigrants in state standardized performance assessments. This could raise curricular expectations, but also could lead to counterproductive experiences of failure, especially if the states fail to provide tests in the students’ native languages.<sup>102</sup> Recently, the federal government announced that recent immigrants could be exempt from the English assessments during their first year in school in the United States and that schools did not have to include those scores in their overall results.<sup>103</sup> These students would still be expected to take exams in mathematics, with help in their native language.<sup>104</sup> A deputy superintendent in Massachusetts commented that the previous policy was punitive: “It’s a form of child abuse to require students to take this test when we know they’re going to fail.”<sup>105</sup> Many school officials remain worried about the moment when English language learners must be counted within school-wide English assessments because their inclusion would distort what the

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100. Deirdre Fernandes, *Schools to Open Special Program: Newcomer’s Academy Will Help Hispanics with Language Barrier*, WINSTON-SALEM J., Apr. 22, 2003, at A1.

101. Pub. L. No. 107-110, 115 Stat. 1425 (2002).

102. See Robert A. Frahm, *Big Test, No Hope: No Child Left Behind Offers No Break for Language Barrier*, HARTFORD CURRENT, Oct. 19, 2003, at A1.

103. Jared Stearns & Suzanne Sataline, *New Immigrants Get Break on MCAS Test*, BOSTON GLOBE, Feb. 21, 2004, at B1.

104. *Id.*

105. *Id.* at B4 (quoting Steven Mills, deputy school superintendent in Worcester).



schools actually are achieving, both with these students and with the students who already speak English. Under the No Child Left Behind Act, costly remedial efforts as well as stigmatizing sanctions attach to schools with low performance scores. Backlash against the law has led states to seriously consider opting out of the funding that attaches to the assessment obligations.

Gay and lesbian students: The New York City public school system established the Harvey Milk High School in 1985 for gay and lesbian teenagers.<sup>106</sup> Its goal was to create a supportive and safe place for students who faced violence or intimidation.<sup>107</sup> When it expanded in the fall of 2003, from two classrooms with 50 students to eight classrooms with 170 students, the school triggered protests—especially from conservative religious groups.<sup>108</sup> Critics include gay rights supporters who oppose segregation and warn that the separate schooling fails to equip these students for the real world and fails to dismantle discrimination.<sup>109</sup> One critic said, “[t]hrough long, painful years we reached a consensus that we couldn’t allow segregation. This is a short-term gain and we need to look at the long-term, larger issues.”<sup>110</sup> A Michigan editorial took up the issue and also opposed the separate school:

Advocates say that by having their own school, gays will feel more comfortable and won’t be subjected to the intimidation that many of them now face in public schools. That argument comes uncomfortably close to racial segregationists in the 1950s and 1960s who insisted that black students did best when they were “among their own.”<sup>111</sup>

Yet, advocates indicate that, due to harassment and violence, gay teens are much more likely to drop out or attempt suicide than other

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106. It may also be a haven for students who are transgendered or *perceived* to be gay or lesbian.

107. See Katherine Zoepf, *Protests Mar Opening of Expanded Harvey Milk School*, N.Y. TIMES, Sept. 9, 2003, at B3.

108. *Id.*

109. See Tania Branigan, *Responding to a Need, or to Fear? Criticism Greet School for Gay Youth*, WASH. POST, Sept. 9, 2003, at A03.

110. *Id.* (quoting Bill Dobbs, lawyer and gay activist).

111. Editorial, *Gay School Not Right Solution*, BATTLE CREEK ENQ., Aug. 4, 2003, at 6A.

students, and they need a special school.<sup>112</sup> Given evidence that calling someone “gay” remains a common insult among teens,<sup>113</sup> sorting out how best to assist students today while also addressing prejudice and cruelty aimed at lesbian and gay students will undoubtedly pose challenges for some time to come. A voluntary separate school along these lines may seem more acceptable in a large system, like New York’s, that includes citywide special schools in science, fashion, and other topics. As a result, the Harvey Milk School includes gay and lesbian students who enroll in the larger city project of magnet schools with special themes.<sup>114</sup> Yet, it remains troubling to conceive as “voluntary” enrollment a student’s selection of a special school because he wants to escape harassment at the regular school. Whether separate instruction is equal seems less relevant than determining how to make integrated education safe. In the meantime, although some people object to any public school acknowledgment of the sexual orientations of students, the commitment to equal opportunity for gay and lesbian students animates most of the arguments on both sides of this issue.

Religious students: Perhaps advocacy of educational opportunities for religious students is the least predictable legacy of *Brown v. Board of Education*. I admit, the influence is indirect and requires standing back from much of the explicit legal arguments to look at the broader context. Yet in both the context of public aid to religious schools and in the treatment of religion in public schools, concerns about equality have reframed preoccupations with separating church and state. A principal architect of this shift is Michael McConnell, long-time law professor and now appellate court judge, whose scholarship and advocacy argued against separate spheres of public and private—with religion relegated to the private—and instead argued for full and equal rights for religious individuals in the public sphere.<sup>115</sup> It surely is no accident that McConnell also has written

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112. Branigan, *supra* note 109, at A03 (quoting students and advocates).

113. See James Quinn, Editorial, *Reactions to a “Gay School,”* Student Briefing Page, *NEWSDAY*, Dec. 4, 2003, at A26.

114. Thanks to Susan Steinway for this observation.

115. See Michael W. McConnell, *The Origins and Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1410 (1990); Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1 (2000); Michael W. McConnell, *Religious Participation in*

extensively on the fourteenth Amendment and racial desegregation.<sup>116</sup>

As counsel for students seeking state university funding for their Christian publication, McConnell successfully persuaded five justices of the Supreme Court to focus on the inequality in the denial of funding, given subsidies to other student publications.<sup>117</sup> Accordingly, the Supreme Court rejected as unconstitutional the exclusion of a religious student newspaper from eligibility for funding by a state university because such exclusion amounted to impermissible viewpoint discrimination under the guarantee of freedom of speech.<sup>118</sup> Similarly, it would be illegal viewpoint discrimination to deny access to space in the public school after the end of the school day to a religious after-school program.<sup>119</sup> These arguments shrink concerns about government establishment of religion and bring religious students and their families into the pluralist, multicultural world created by *Brown* and its advocates.

McConnell also has articulated a generous view of the constitutional duty to accommodate religious believers.<sup>120</sup> McConnell, as a law clerk for Justice William Brennan, advanced the view that prevailed in the Supreme Court: campus religious organizations cannot be denied the right of access to facilities that a public university grants to other organizations.<sup>121</sup> Offering access to a religious group would not amount to a violation of the Establishment Clause because similar access would be accorded to other groups.

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*Public Programs: Religious Freedom at a Crossroads*, 59 U. CHI. L. REV. 115 (1992). This view should be distinguished from the conception that religion should never be treated differently from other personal views or commitments. Christopher Eisgruber and Lawrence Sager argue that equality would forbid the government from treating religion differently from any other category even if that difference takes the form of a preference or accommodation. See Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245 (1994).

116. Michael W. McConnell, *Originalism and the Desegregation Decisions*, 81 VA. L. REV. 947 (1995); Michael W. McConnell, *The Originalist Case for Brown v. Board of Education*, 19 HARV. J.L. & PUB. POL'Y 457 (1996).

117. See *Rosenberger v. Univ. of Va.*, 515 U.S. 819 (1995); Transcript of Oral Arguments (No. 94-329), available at 1995 WL 117631.

118. *Rosenberger*, 515 U.S. at 845.

119. *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001).

120. Michael W. McConnell, *Accommodation of Religion*, 1985 SUP. CT. REV. 1; Michael W. McConnell, *Accommodation Under the Religion Clauses*, 81 NW. U. L. REV. 146 (1986).

121. *Widmar v. Vincent*, 454 U.S. 263 (1981); see also Jeffrey Rosen, *Is Nothing Secular?*, N.Y. TIMES, Jan. 30, 2000 (Magazine), at 40, 43–44.

Refusing access to a group because of its religious identity or message in turn would violate the Free Speech Clause by disfavoring one message or viewpoint.<sup>122</sup> Therefore, a state university regulation that prohibited student use of school facilities for religious worship or preaching would violate the guarantee of freedom of speech, while an equal access policy would not violate the Establishment Clause. This is precisely how the Court summarized its decision when later interpreting the federal Equal Access Act<sup>123</sup> to establish similar requirements for public secondary schools receiving federal funds.<sup>124</sup> The Court subsequently found a public school district in violation of the Free Speech Clause in denying a church access to school facilities after school hours to show a film with a religious approach to child-rearing.<sup>125</sup> Similarly, the Court found a school violated the Free Speech Clause when it denied access to a religious after-school program, and that such access would not violate the Establishment Clause.<sup>126</sup>

McConnell testified before the Senate Judiciary Committee in favor of the general idea of a religious equality amendment that would allow prayer in public schools.<sup>127</sup> Equality as well as freedom was at stake, in his view, and he drew an analogy to racial equality in defending the need to recognize the rights of individuals to exercise their religious beliefs without fear of discrimination or denial of benefits. After a court of appeals found it within the discretion of a ninth grade teacher to disallow a student's proposed research paper on Jesus Christ, McConnell declared that he had "little doubt that the case would have come out the other way if a racist teacher had forbidden a paper on Martin Luther King, Jr., or an anticommunist teacher had forbidden a paper on the evils of capitalism."<sup>128</sup> Mindful of the comparison between race and religion, advocates like

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122. See Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1 (1986).

123. 20 U.S.C. §§ 4071-74.

124. See Bd. of Educ. of the Westside Cmty. Sch. v. Mergens, 496 U.S. 226 (1990).

125. Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993).

126. Good News Club v. Milford Central Sch., 533 U.S. 98 (2001).

127. *Religious Freedom: Hearing Before the Senate Comm. on the Judiciary*, 104th Cong. (1995), available at 1995 WL 11095849.

128. *Id.* (referring to *Settle v. Dickson County Sch. Bd.*, 53 F.3d. 152 (6th Cir. 1995)).

McConnell have successfully extended the legacy of *Brown* to religious students and schools.

Even when it comes to public financial support for parochial schools, McConnell and other lawyers have effectively shifted the legal framework from Establishment Clause and even Free Exercise claims to considerations of equality and viewpoint discrimination, contrary to the free speech guaranty. Recasting earlier concerns about public funds contributing to religious activities—and leaving behind the 1960s and 1970s jurisprudence that incoherently sorted acceptable and unacceptable public aid to religious schools—the Supreme Court has asked instead whether the aid comes through a general program with neutral, secular criteria that neither benefits or disadvantages religion. Under such a test, the Court has upheld a voucher program enabling parents to select a private parochial school for their children,<sup>129</sup> as well as the use of public dollars to pay for books, computer software, and other secular materials for use in a private religious school.<sup>130</sup> In his concurring opinion, Justice Thomas cited *Brown*'s declaration of the importance of schooling to an individual's success in life while pointing to the failing Cleveland schools that prompted the voucher program.<sup>131</sup> He also stressed that minority and low-income parents express the strongest support for vouchers that enable them to select private schools for their children and rejected opposition as preoccupied with formalistic concerns far from the core purposes of the Fourteenth Amendment.<sup>132</sup>

The Court also has warned that excluding religious schools from generally available aid could present a violation of the Free Exercise clause.<sup>133</sup> Not only is there no constitutional violation in including religious schools within the eligibility criteria for public funds that are otherwise generally available, the courts could find a constitutional defect if religious schools generally are excluded from public aid.<sup>134</sup> Commentators expressly describe these developments

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129. *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

130. *Mitchell v. Helms*, 530 U.S. 793 (2000) (plurality opinion) (rejecting Establishment Clause challenge because the program was generally available).

131. *Zelman*, 536 U.S. at 676 (Thomas, J., concurring).

132. *Id.* at 682.

133. *Mitchell*, 530 U.S. at 835 n.19.

134. See Christopher P. Coval, Note, *Good News For Religious Schools and the Freedom*

as ending second-class treatment of religious schools.<sup>135</sup> The traditional “separation of church and state” becomes unacceptably unequal in this light.

The structure of this last point looks a bit like an equality argument, but the influence of *Brown* in the context of challenges to public aid to religious schools is even more direct. In the majority opinion in *Zelman v. Simmons-Harris*, the Court emphasized the explicit justification for the voucher experiment in Milwaukee as improving educational opportunities for low-income minority children.<sup>136</sup> In his separate concurring opinion, Justice Thomas, holding Justice Thurgood Marshall’s seat on the Court, stressed that *Brown*’s promise remained distant because of the deterioration and continuing segregation of urban schools.<sup>137</sup> Justice Thomas embraced the irony that although vouchers seemed a tool to promote white flight at the time of *Brown*, nearly 50 years later, vouchers could open quality instruction for students otherwise trapped in failing public schools.<sup>138</sup> He emphasized that minority and low-income parents are among the strongest supporters of voucher programs because they open up better educational opportunities for their children. But if some see the voucher case as a step toward fulfilling *Brown*’s vision of equal educational opportunities for students of color,<sup>139</sup> others caution that because need may induce parents to send their children to religious schools, voucher programs using public dollars could violate the Establishment Clause or Free Exercise Clause.<sup>140</sup>

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of Speech, 83 B.U. L. REV. 705 (2003).

135. Arnold H. Loewy, *The Positive Reality and Normative Virtues of a “Neutral” Establishment Clause*, 41 BRANDEIS L.J. 533, 542–43 (2002).

136. *Zelman*, 536 U.S. at 644–45.

137. *Id.* at 676–77, 682–83.

138. *Id.*

139. Frank J. Macchiarola, *Why the Decision in Zelman Makes So Much Sense*, 59 N.Y.U. ANN. SURV. AM. LAW. 459, 464–67 (2003); see also Mark Tushnet, *Vouchers After Zelman*, 2002 SUP. CT. REV. 1 (2002).

140. See Ira C. Lupu & Robert Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian Service Providers*, 18 J.L. & POL. 539 (2002). I have in the past worried that vouchers will undermine the vision of the “common school” where children of different backgrounds learn together, a vision predating *Brown* but invigorated by it. See, e.g., *Reason, Passion, and the Progress of Law: Remembering and Advancing the Constitutional Vision of Justice William J. Brennan, Jr.*, 43 N.Y.L. SCH. L. REV. 101, 124

With advocates and courts reframing the question from aid to religious schools to equal treatment for religious students and religious ideas, *Brown's* legacy may also reflect a broader commitment to pluralism, or perhaps the triumph of identity politics.<sup>141</sup> Jeffrey Rosen puts it this way:

Americans have always been deeply religious and deeply suspicious of state-imposed uniformity. In an era when religious identity now competes with race, sex and ethnicity as a central aspect of how Americans define themselves, it seems like discrimination—the only unforgivable sin in a multicultural age—to forbid people to express their religious beliefs in an increasingly fractured public sphere. Strict separationism, during its brief reign, made the mistake of trying to forbid not only religious expression by the state, but also religious expression by citizens on public property.<sup>142</sup>

In practice, vouchers may produce more segregation by enabling more students to enroll in parochial schools, thereby diminishing the ability of public schools to serve as the meeting place for all students.<sup>143</sup> Vouchers and subsidies for private schools may well draw Protestant students into Catholic schools and continue the diversification of the urban Catholic school that has proceeded for the past several decades.<sup>144</sup> Greater accommodation of religious students in public schools may push in the other direction by making public schools more hospitable for them, but there are risks of introducing new forms of peer exclusion and hierarchies where religious activities and affiliations are divisive. An eerie mirror image of our paradoxes and challenges in religious accommodation rises across the ocean as France contemplates banning head scarves and other highly visible religious symbols in the public schools. This ostensible commitment to reinforcing the inclusive features of French

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(1999) (comments of Martha Minow).

141. See Martha Minow, *On Being a Religious Professional: The Religious Turn in Professional Ethics*, 150 U. PA. L. REV. 661 (2001); Rosen, *supra* note 121.

142. Rosen, *supra* note 121, at 45.

143. See MARTHA MINOW, PARTNERS, NOT RIVALS: PRIVATIZATION AND THE PUBLIC GOOD 89–93, 116–18 (2002).

144. See ANTHONY S. BRYK ET AL., CATHOLIC SCHOOLS AND THE COMMON GOOD (1993).

republican identity may not only symbolically exclude some, but may actually drive observant Muslim girls into self-segregated religious schools.

### III. ASSESSING THE LEGACIES

There are other surprising legacies of *Brown*. Advocates for Roma children in Eastern Europe not only cite *Brown*, but model their movement for educational rights after the NAACP's strategy.<sup>145</sup> The high courts in South Africa and India have cited *Brown*'s principles. And the analogy to "separate but equal" does indeed dominate the current controversy over same-sex marriage and the compromise position of civil unions. The enormous influence of *Brown* probably cannot accurately be assessed by those of us who live in its wake, but I suspect that historians will look back and see how much it spread equality as the framework for legal, political, and social argument within the United States and beyond.

But what of integration? Outside the racial context, *Brown*'s recognition that separate is inherently unequal rightly disturbs ready tendencies to pursue separate solutions, in schools and elsewhere, for girls, gays, immigrants, children with disabilities . . . and yet the gnawing sense persists that sometimes specialized, separate settings are valuable or necessary. I suggest that *Brown* crucially put to us the dual insight: (1) that educational opportunity is so crucial to any individual's realistic chances of success in life that it is a right that must be made available to all on equal terms;<sup>146</sup> and (2) against a history of mandated segregation, separate educational facilities are inherently unequal.<sup>147</sup>

Segregation, even if so-called voluntary, should raise concerns over assumptions that it is better or easier and should be scoured for evidence that it actually promotes equal opportunity for each individual to have real success in life. The reasons offered for separate instruction differ and these differences should matter in

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145. Interview with Angela Wu, Harvard law student (July 16, 2004).

146. 347 U.S. 483, 493 (1954).

147. *Id.* at 495.



resolving doubts about its particular use. Thus, for some children with disabilities, and for adolescents who have recently arrived in the United States with little or no formal schooling, separate instruction seems crucial in order to provide the content appropriate to the students' needs. The activities of the regular classroom are simply too remote from where these students are, at least for a time, to provide meaningful educational opportunities. For some girls and for some boys, separate instruction may reduce distractions and create an ethos of achievement that boosts learning. Perhaps this is also true for some students in majority-minority schools, although arguments about their ethos often seem to reflect the lack of realistic chances for integration. Researchers continue to find evidence of higher student achievement for students of color who attend integrated schools.<sup>148</sup>

For some gay and lesbian teens, separate instruction seems crucial for protection from harassment, hatred, and violence. Separate instruction for them seems almost a desperate response to inhospitable and dangerous settings, but also a concession to the negative attitudes and behaviors of others that could, and should, be challenged and changed. Here, it is important to consider how much changing those attitudes and behaviors depends upon tackling the assumption that separate settings are safer and are acceptable.

In scrutinizing contemporary uses of separate instruction, we should return to *Brown*. The Supreme Court's decision fundamentally represented recognition that the entire community is affected by the treatment of any of its members. Hannah Arendt, Holocaust refugee and political theorist, initially did not understand much of this and wrote a controversial critique of President Eisenhower's use of federal troops to enforce the token desegregation of Little Rock's Central High School.<sup>149</sup> Reflecting on her own experience with Nazism, Arendt worried about the loss of a private right of freedom of association, cautioned against Black demands for social equality given the risks to more fundamental rule of law, and warned about the forced participation of children to lead social and political changes sought by adults.<sup>150</sup>

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148. ORFIELD & LEE, *supra* note 9, at 22–26.

149. Hannah Arendt, *Reflections on Little Rock*, 6 DISSENT 45 (1959).

150. *Id.*

Ralph Ellison challenged Arendt and told her that she did not understand the role of school children in the struggle for racial desegregation as initiation into a racist world—and also part of an African-American tradition of self-sacrifice.<sup>151</sup> At least in reply, Arendt acknowledged that she had not fully understood the situation.<sup>152</sup> The issue of sacrifice deserves more attention in today's segregative and integrative debates for the variety of students I have discussed; perhaps we have fallen too quickly into a view of children as vulnerable, and neglected not only their resilience but also how much strength they may find in tackling social problems with adults on their side.

Even before her change of heart, Arendt wrote that, given the lack of a common past or homogeneous population in the United States, the very survival of the United States would depend upon “its all-comprehensive, typically American form [of] equality [which] possesses an enormous power to equalize what by nature and origin is different.”<sup>153</sup> Discerning precisely how to realize this potential remains our challenge today. Race, ethnicity, language, disability, gender, citizenship, sexual orientation, religion—none of these should interfere with an individual student's equal chance to learn. But what should this mean for us? The surprising legacies of *Brown* must make this the question for us all.

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151. See ELIZABETH YOUNG-BRUEHL, HANNAH ARENDT: FOR LOVE OF THE WORLD 316 (1982).

152. *Id.*

153. James S. Liebman, *Desegregating Politics: “All-Out” School Desegregation Explained*, 90 COLUM. L. REV. 1463, 1582 n.507 (1990) (quoting Arendt, *supra* note 149, at 47–48).